FAIR EMPLOYMENT & HOUSING COMMISSION
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NOTICE OF COMMISSION FINAL DECISION

DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING

v.

UNITED PARCEL SERVICE, INC.,
(Eva Linda Mason, Complainant)

Case No.: E200809-K-0620-00-pe
C 09-10-015

Decision No.: 11-05

Enclosed is a copy of the decision of the Fair Employment and Housing Commission in the above-entitled case. (See Cal. Code Regs., tit. 2, § 7434, subd. (a).) The decision becomes effective on **June 2, 2011.** (See Cal. Code Regs., tit. 2, § 7434, subd. (g).)

Should you wish to request the Commission to reconsider this decision, you must file a motion for reconsideration meeting the requirements of California Code of Regulations, title 2, section 7436. The Commission's power to order reconsideration expires on the effective date of the decision stated above, and any motion for reconsideration must be filed with the Commission on or before **May 23, 2011.**

If extraordinary circumstances exist and you need more time to file a motion for reconsideration, you may also file a motion to extend the time within which the Commission can order reconsideration for 30 days, pursuant to the statute and regulations cited above. A motion to extend time for reconsideration must be filed with the Commission on or before **May 23, 2011.** (Cal. Code Regs., tit 2, § 7436, subd. (a).)

Should you wish to seek judicial review, you may do so by filing a petition for writ of mandate in accordance with Code of Civil Procedure section 1094.5, Government Code section 11523 and California Code of Regulations, title 2, section 7437.

Date: **May 3, 2011**

BEFORE THE FAIR EMPLOYMENT AND HOUSING COMMISSION
OF THE STATE OF CALIFORNIA

In the Matter of the Accusation of the DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING v. UNITED PARCEL SERVICE, INC., Respondent. EVA LINDA MASON, Complainant.	Case No. E200809-K-0620-00-pe C 09-10-015 11-05 DECISION

The Fair Employment and Housing Commission hereby adopts the attached Proposed Decision as the Commission's final decision in this matter.

Any party adversely affected by this decision may seek judicial review of the decision under Government Code section 11523, Code of Civil Procedure section 1094.5, and California Code of Regulations, title 2, section 7437.

Any petition for judicial review and related papers shall be served on the Department of Fair Employment and Housing, the Commission, respondent, and complainant.

DATED: April 7, 2011

FAIR EMPLOYMENT AND HOUSING COMMISSION

GEORGE WOOLVERTON	PATRICIA PEREZ
LINDA NG	KRISTINA RASPE

CONCURRENCE & DISSENT

I concur with the majority that UPS did not violate Government Code section 12940, subdivision (n). The evidence shows that Mason repeatedly failed to respond to multiple letters from UPS. Even if UPS were incorrect in its assumptions, and even if its letters were either imprecise or just plain wrong, at the heart of the interactive process is a mutual obligation to engage one with the other. Although UPS may have had a "flawed" process, as characterized by the majority, the majority is correct that an employee may not remain "passive and unresponsive." The FEHA requires more of an employee. Because of Mason's failure to engage in a timely, good faith interactive process, as required by section 12940, subdivision (n), the DFEH's claim based thereon must fail.

I also concur with the majority's finding of no violation of Government Code section 12940, subdivision (m). Given the DFEH's position, it has essentially withdrawn this claim. Moreover, on the facts of this case, I would hold that this claim is derivative of the section 12940, subdivision (n) claim, and further hold that because Mason did not engage in a timely, good faith interactive process, the DFEH cannot maintain a subdivision (m) claim.

I dissent from the majority's finding of a violation of Government Code section 12940, subdivision (a). Even though the majority finds a mutual failure to engage in the interactive process, in the context of the subdivision (n) claim, the majority nevertheless focuses solely on UPS's alleged conduct in the context of the subdivision (a) claim. I cannot take such a narrow focus.

It seems that the reason Mason was discharged was a direct result of the breakdown in the interactive process. It seems likely that had the parties engaged in a timely, good faith interactive process, as the FEHA requires, Mason would not have found herself in the position she was in.

The majority speculates that even if Mason had engaged in an interactive process, "there was no guarantee" of any outcome favorable to Mason. Of course not. The interactive process is not designed to guarantee any particular outcome. But only after engaging in a timely, good faith interactive process can we evaluate whether any particular outcome is consistent with the requirements of the FEHA. In short, I would hold that on the facts of this case, the subdivision (a) claim is derivative of the subdivision (n) claim, and that UPS has not violated subdivision (a).

Finally, I concur with the majority in finding that UPS violated Government Code section 12940, subdivision (k). In *Dept. Fair Empl. & Hous.v. Lyddan Law Group, LLP* (October 19, 2010) No. 10-04-P [2010 WL 4901732, at *16 (Cal.F.E.H.C.), we held that the DFEH may maintain a claim under subdivision (k), even if there is no violation of Government Code section 12940, subdivision (a). This case is another good example of why the DFEH should have such authority.

Although Mason may not be entitled to individual remedies, the DFEH is entitled to certain equitable remedies under subdivision (k) to require UPS to revise and to improve its rules and policies regarding actual or perceived disabilities so that a case like this does not happen again. In particular, I join Section E of the Remedy discussion above, except for the requirement of posting Attachment A. Given the shared responsibility for the failure of the interactive process, these equitable remedies are appropriate.

With respect to the Remedy, I dissent from the orders of back pay, reinstatement, and actual damages in light of my finding no violation of subdivisions (a), (m), and (n).

As an alternative to mandatory reinstatement, and in light of the subdivision (k) violation, I would order both UPS and Mason to engage in a good faith, interactive process, just as they should have done all along. If, as a result of this process, reinstatement were warranted, I would order it. If it were not, I would not require it.

With respect to the administrative fine, I dissent. On the record presented, there simply is not clear and convincing evidence upon which to base such a fine. The heart of this case was and remains the failure of the parties to engage in the interactive process. Given that both UPS and Mason share blame for the breakdown in the interactive process, I cannot see any justification to assess an administrative fine against UPS. UPS may have failed in various respects with respect to Mason, but it did not engage in fraud, malice, or oppression.

For the reasons stated, I concur and respectfully dissent as indicated.

STUART LEVITON

BEFORE THE FAIR EMPLOYMENT AND HOUSING COMMISSION
OF THE STATE OF CALIFORNIA

In the Matter of the Accusation of the DEPARTMENT OF FAIR EMPLOYMENT AND HOUSING v. UNITED PARCEL SERVICE, INC., Respondent.	Case No. E200809-K-0620-00-pe C 09-10-015 PROPOSED DECISION
EVA LINDA MASON, Complainant.	

Administrative Law Judge Caroline L. Hunt heard this matter on behalf of the Fair Employment and Housing Commission on May 12, and 17 through 19, 2010, in Riverside, California. Alexandra Seldin, then Staff Counsel, and Ralph Tsong, Senior Staff Counsel, represented the Department of Fair Employment and Housing (DFEH). George Abele, Esq., and Cindy Morgan, Esq., of Paul Hastings, Janofsky & Walker LLP, represented United Parcel Service, Inc. Complainant Eva Linda Mason and United Parcel Service, Inc.'s Human Resource Manager, Christine Castaldi-Inman, were present throughout the hearing.

On receipt of the transcripts, both parties timely filed closing briefs, the latter received by the Commission on August 4, 2010, and the matter was deemed submitted.

After consideration of the entire record, the administrative law judge makes the following findings of fact, determination of issues, and order.

FINDINGS OF FACT

1. On October 17, 2008, complainant Eva Linda Mason (Mason or complainant) filed a written, verified complaint with the DFEH alleging that her employer United Parcel Service denied her reasonable accommodation and terminated her employment because of her disability (knee injury) in violation of the Fair Employment and Housing Act (FEHA or Act). (Gov. Code, § 12900, *et seq.*)

2. The DFEH is an administrative agency empowered to issue accusations under Government Code section 12930, subdivision (h). On October 15, 2009, Phyllis W. Cheng, in her official capacity as Director of the DFEH, issued an accusation against respondent United Parcel Service, Inc. (UPS or respondent). The accusation alleged that UPS discriminated against Mason and barred her from employment based on her disability and/or perceived disability (left knee injury); failed to reasonably accommodate her; failed to engage in a timely, good faith, interactive process; and failed to take all reasonable steps necessary to prevent discrimination from occurring. The DFEH asserted that this conduct violated, respectively, Government Code section 12940, subdivisions (a), (m), (n), and (k).

3. At all relevant times, UPS was engaged in the business of international and domestic parcel delivery, employing between 8,000 to 10,000 employees in its Southeast California District, and is an employer within the meaning of Government Code sections 12926, subdivision (d), and 12940, subdivisions (a), (k), (m) and (n).

4. Eva Linda Mason began working for UPS at its San Bernardino facility in October 1997, becoming an Operations Management Specialist in June 1998. In 2000, Mason transferred to an Operations Management Specialist position at UPS's Riverside facility, located at 1391 Spruce Street, Riverside, California. Mason worked a part-time Operations Management Specialist position at the Riverside facility, on a daily five and one-half hour morning shift.

5. In 2007, Eric DeCoud was Business Manager at the Riverside UPS facility, responsible for overall management of the Riverside UPS facility and its employees. Mason's direct supervisor was Frank Lonning, On-Road Supervisor.

Operations Management Specialist Position

6. Mason's key duties as an Operations Management Specialist involved handling customer calls and complaints relating to the shipment of packages by UPS. Over 75 percent of her time was spent either on the telephone or at the computer, responding to messages and emails, contacting customers, communicating with UPS drivers, and tracking packages. Mason was also responsible for dispatching UPS drivers to pick-up packages that customers had requested be shipped. UPS used an automated tracking system to scan and track packages, and used communications devices, called "DIADs" to send delivery information to drivers.

7. In 2007, UPS employed five Operations Management Specialists, including Mason. Their daily shifts' start times were staggered by about an hour each, with the first shift beginning work at 6:30 a.m., the second at 7:30 a.m., etc. All of the Operations Management Specialists, who were salaried, worked with and directed hourly clerical staff, who were generally union employees, subject to a collective bargaining agreement. Under the collective bargaining agreement, hourly clerical staff physically handled and advanced packages, not the salaried staff. However, if a clerk was not available or if there was an

emergency situation, an Operations Management Specialist might need to locate a package within the UPS warehouse building or to deliver a message to a driver. On occasion, the Operations Management Specialist might need to go into the package room or up onto the dock in the center of the warehouse. The dock was a raised platform with two steps. Generally, less than 25 percent of the duties of the Operations Management Specialist required physically walking around the warehouse facility, such as to the package room, or to the drivers' bays, and the need for these tasks varied on a daily basis.

8. UPS did not maintain a written job description of the duties of Operations Management Specialists, but had promulgated a document dated December 21, 2005, entitled "Position: Operations Management Specialists (OMS); Essential Job Functions" (OMS Position Statement), which described that incumbents in the position may be required to, in pertinent part:

- Sit continuously for the duration of the workday
  --Part-time: up to 5.5 hours per day, 5 days per week
  --Full-time: up to 9.5 hours per day, 5 days per week;
- Bend stoop/squat, crouch, stand and walk intermittently throughout the work day;
- Perform office tasks using simple hand grasping, fine hand manipulation, and reaching associated with assigned tasks such as paperwork, typing, and/or use of a computer, filing, calculating and use of telephone;
- Lift, lower, push, pull, leverage and manipulate equipment and/or packages weighing up to 70 pounds...

Complainant's On the Job-Injury

9. In 1993, during her employment at UPS, Mason sustained an injury to her left knee in a work-related incident, when she hit that knee on the corner of a broken filing cabinet. She subsequently underwent arthroscopic surgery and removal of a cyst in 2003.

10. In early June 2007, Mason experienced a series of "popping" sensations in her left knee, and experienced increasing pain in her knee.

11. On June 14, 2007, Mason notified her immediate supervisor, Frank Lonning, of her knee pain. Lonning referred Mason to the UPS medical clinic, and contacted UPS's workers' compensation carrier, Gallagher Bassett. That day, clinic doctor, Dionisio Lazaro, M.D., issued a work status report stating that Mason could return to work with the following restrictions: unable to kneel, squat or use a ladder; able to stand or walk intermittently. Mason also received a referral for an M.R.I. and consultation with an orthopedic surgeon, Barry Scott Grames, M.D., of Arrowhead Orthopedics.

12. Effective June 15, 2007, UPS classified Mason's employment status as on "temporary alternative work." The record did not reflect who at UPS decided on this status; no one at UPS discussed it with Mason and she was not aware of it. Human Resources

logged Mason's temporary alternative work status into UPS's Human Resources Reporting System (H.R.R.S.), tracking the time elapsed since her injury.

13. On July 18, 2007, Mason saw the orthopedic surgeon Dr. Grames for an initial consultation. The doctor suspected a medial meniscus tear in Mason's left knee, and wanted to review her prior medical records relating to her 2003 injury and her recent M.R.I. results. In all workers' compensation cases, it was Arrowhead Orthopedics' customary practice to prepare work status reports describing the patients' limitations and what they can do at work, and send copies to the workers' compensation carrier or employer. In Mason's case, UPS's workers' compensation carrier was Gallagher Bassett. Mason's work status at her first consultation at Arrowhead Orthopedics, based on Dr. Grames' evaluation, was to "[c]ontinue her usual and customary duties."

14. From the date of her June 14, 2007 report of her knee injury, Mason continued working her customary duties as an Operations Management Specialist. Her knee was painful, but she felt that she could perform all of her job duties.

15. On July 24, 2007, Mason again saw Dr. Grames, who administered an injection into Mason's knee. A work status report issued that day stated that Mason was "temporarily totally disabled;" however, the report was issued in error, and corrected within a week, to state that Mason "may continue her usual and customary duty."

16. Brenda Hellerud was UPS's District Occupational Health Supervisor, working out of UPS's Ontario, California-based Occupational Health Department. On July 26, 2007, Hellerud received a voicemail message from Rolf Pherigo, of UPS's Safety Division, stating that he and Safety Manager Bobby Esquivel would no longer accept "temporary alternate work" for Mason. Under UPS's policy, there was no set limit for the amount of time a salaried employee could be classified as on "temporary alternate work," and no explanation was provided in Mason's case why she could not continue. Pherigo told Hellerud that Mason was to be placed on "lost time," i.e., placed out on leave, and asked Hellerud to send Mason an "ADA packet."

17. The "ADA packet," referencing the Americans with Disabilities Act,[1] was UPS's standard mechanism for requesting information from an employee's medical provider when reasonable accommodation for a claimed disability was requested or needed, as part of UPS's 10-Step Accommodation Process. The ADA packet consisted of a cover letter to the employee, a four-page list of questions addressed to the medical provider, a position statement describing the physical abilities needed to perform the position, and an authorization for release of medical records. An employee had to submit the information requested on the forms provided in the ADA packet, as a prerequisite to obtaining UPS's

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[1] The Americans with Disabilities Act of 1990 (Pub.L. No. 101 336) (Jul. 26, 1990) 104 Stat. 328, 42 U.S.C. § 12101, et seq. (ADA), as amended, ADA Amendments Act of 2008 (Pub.L. No. 110-325) (Sep. 25, 2008) 122 Stat. 3554 (ADAAA).

consideration of a request for reasonable accommodation. Thereafter, UPS referred the accommodation request to a variety of committee reviews for evaluation, pursuant to its 10-Step Accommodation Process, and as set out in UPS's ADA Procedural Compliance Manual, which discussed the application of the federal law, without referencing the FEHA.

18. UPS's form request for information from an employee's medical provider asked for the following information, in summary:

- Is the employee currently able to perform all of the functions of his/her position? If no, identify which;
- Identify the diagnosis or describe the condition that precludes or impairs the employee's ability to perform the specific job function identified;
- Detail the degree or extent of job restrictions and state the known or expected duration of the job restrictions;
- Describe the activities the employee can perform with the listed restriction;
- Are there any medications and/or corrective devices that would enable the employee to perform the functions of the position? If yes, identify.
- Do diagnoses or conditions affect any major life activities, other than working? If yes, identify.
- Identify tests or diagnostic tools used to determine employee's abilities and impairment.

19. In response to Rolf Pherigo's message, Hellerud opened a file on Mason and, on the same day, July 26, 2007, mailed her an ADA packet. The cover letter stated that the medical information was needed because Mason had "requested a job-related accommodation." Mason did not understand why she had received the documents, because she had not made any request for a job-related accommodation, and did not feel that she needed accommodation. Believing she had no need to respond, Mason did not do so.

20. A week later, on August 1, 2007, Hellerud sent Mason another letter, stating that UPS was aware that Mason needed a "leave of absence due to a work-related illness or injury" and outlining Mason's rights under the Family and Medical Leave Act (FMLA) and the California Family Rights Act (CFRA). The letter advised Mason that she did not need to submit "independent medical certification" because she was already submitting medical information to Gallagher Bassett as part of her workers' compensation claim. In fact, Mason was ineligible for either CFRA or FMLA leave, as stipulated to by the parties at hearing.

21. Mason continued to see Dr. Grames about every four weeks for treatment of her knee injury. Ultimately, on August 8, 2007, Dr. Grames recommended that Mason undergo arthroscopy to repair the torn meniscus and the surgery was scheduled for October 2007.

22. Mason's work status report following her August 8, 2007 visit with Dr. Grames stated that she was "temporarily totally disabled." The record was not clear if this change in work status was the result of UPS not permitting Mason to continue on temporary alternative

work. Dr. Grames used the "TTD" designation on occasion when modified duties were not available.

23. Effective August 9, 2007, Mason was on workers' compensation leave. Human Resources logged Mason's status into its tracking program, H.R.R.S., as on "lost time." While on workers' compensation leave, Mason received $690.12 every two weeks in "temporary disability" payments under the workers' compensation system.

24. On August 10, 2007, Hellerud's office sent out a form reminder letter to Mason about "your recent request for a job-related accommodation," asking for a response by August 24, 2007, or the file would be closed. As Mason was on workers' compensation leave and had not asked for accommodation, she thought it was unnecessary to respond. On August 27, 2007, Hellerud closed Mason's file and, pursuant to UPS's ADA Process, deemed that any request for a job-related accommodation had been withdrawn. The potential consequence for Mason was not explained to her, i.e., that by not submitting the forms that Hellerud had requested and specifically, the four-page information request mandated by UPS's ADA process, Mason could be precluded from working at all at UPS, if she continued to have any work restrictions.

25. On October 4, 2007, Dr. Grames performed arthroscopic surgery on Mason's knee, and found that she did not need any ligament reconstruction. Dr. Grames anticipated a normal recovery time of six weeks. Following Mason's arthroscopy, Arrowhead Orthopedics sent regular work status reports regarding Mason to UPS's workers' compensation carrier Gallagher Bassett, generally following each office visit.

26. On December 19, 2007, Dr. Grames' office prepared a work status report releasing Mason to return to work on modified duties on December 26, 2007, with the restriction of "sedentary work only." Sedentary work, as used by Dr. Grames, meant "primarily a desk job," but did not preclude standing and walking periodically. Mason believed that she was able to do her regular duties with her restriction. She took a copy of the release to Eric DeCoud, Business Manager at the UPS Riverside facility. DeCoud, like other UPS on-site managers, had undergone some computer-based training on accommodation of disabilities. In consulting with his supervisor, Leroy Stampley, DeCoud decided to change Mason to a later start time, 9:00 a.m. in lieu of 7:00 a.m., when the facility was less busy and congested. DeCoud's motivation was to try and ensure that Mason did not re-injure her knee in the future.

27. On December 26, 2007, Mason returned to her job at the Riverside facility. Her start time was changed to 9:00 a.m. each day, but she otherwise resumed her usual duties as an Operations Management Specialist, with the exception that DeCoud advised her not to go up onto the dock, because he was concerned that she might trip and reinjure her knee. For about four weeks after her return to work, Mason used a cane, walked with a limp, and elevated her knee when it bothered her, but was able to perform her normal work tasks. On occasion, some of her co-workers volunteered to help her by delivering messages on her behalf.

28. Starting in January 2008, Mike VanDamme succeeded Eric DeCoud as Business Manager at the Riverside UPS facility. VanDamme was initially not aware that Mason had any medical restrictions and, as far as he observed, she was performing her full duties as an Operations Management Specialist.

29. After several months back at work, Mason accepted an offer to swap shifts with a co-worker in order to work a later shift, starting at 5:00 p.m. Her duties otherwise remained largely the same, except for the additional task of entering timecard data on the computer for all the drivers' hours. She continued to work a five and one-half hour shift each day.

30. At hearing, Dr. Grames was certified as an expert witness for the DFEH on the issue of Mason's treatment and physical limitations. He opined that there was nothing in the limitations that he imposed that would preclude Mason from working, as long as she felt that she could perform her duties safely.

31. Arrowhead Orthopedics' work status reports issued for Mason after her surgery were progressively less restrictive. Following a period of six weeks on sedentary work, i.e. in a desk job, with some getting up and down and walking around, Dr. Grames reported Mason's improved status of "limited standing and walking to tolerance." By this, Dr. Grames meant that Mason should not be required to be on her feet throughout the entirety of the work day, but anticipated that she could determine, by her own comfort level, how much standing and walking she could do. By the time of the next doctor visit, four and one-half weeks later, Mason no longer had any standing or walking restrictions. Her limitations in mid-March 2008, according to Dr. Grames, were "limited stooping, bending and kneeling," meaning that, while the job should not require these motions repetitively, occasionally or intermittently stooping, bending or kneeling was "fine." Dr. Grames considered the work restrictions he proscribed to be "subjective," meaning that he left it largely to Mason to determine what her abilities were and if she needed to limit her activities. He informed Mason that it was up to her to decide, based on how her knee felt, to what extent and duration she could perform these activities, if needed. He did not consider that her limitations were inconsistent with her work requirements, as long as Mason felt she could do her job. In practice, throughout her work day, Mason felt able to perform all of her job duties. For a while she took anti-inflammatory medications for pain relief, but discontinued them when they upset her stomach.

The following table summarized Dr. Grames' restrictions, and Mason's progressive improvement, from her release in late December 2007 until mid-March 2008.

Date of Report	**Mason's Work Status as Reported by Dr. Grames to Gallagher Bassett Following Mason's 10/07 Arthroscopic Surgery & Release To Return to Work**
December 26, 2007	Return to work, sedentary work only
January 31, 2008	sedentary work

February 13, 2008	limited standing and walking to tolerance
March 19, 2008	limited stooping, bending and kneeling

32. On a date not identified in the record, but after Mason's return to work following her December 26, 2007 arthroscopic surgery, UPS's Human Resources classified Mason as being on "residual disability." This was a term used in UPS's Flexible Benefits Plan, which provided income protection for short and long term disability for UPS's management, specialist, administrative and technical non-union employees, and placed a 12-month cap on the length of time an employee could be away from working his or her regular duties. There was no evidence that Mason actually applied for or received any benefits under the Flexible Benefits Plan.

33. In late February 2008, after Hellerud learned that Mason was back at work with restrictions, she emailed UPS Risk Management, "Do you know if there was an agreement, outside the ADA process, to return her to work with restrictions?" Hellerud did not understand how Mason had been permitted to return to work when she still had restrictions, especially as she had not followed UPS's ADA process. Hellerud did not attempt to contact Mason to discuss the restrictions or how Mason was performing her work duties. If she had done so, Hellerud would have learned that Mason felt that she was performing all of her regular duties without difficulty.

34. On March 26, 2008, Hellerud received an emailed work status update from Gallagher Bassett, describing Mason's condition ("post left knee arthroscopy"), and noting her work restrictions of "limited stooping, bending and kneeling." Hellerud did not try to talk with Mason or her supervisor to determine Mason's current ability to perform her job.

35. On March 26, 2008, Hellerud sent Mason a letter, titled "Nine Month Letter to Non-Union Employees on Residual Disability." The letter stated that Mason had "been unable to perform the essential functions of [her job]" since June 15, 2007, and had been working on residual disability pursuant to the Income Protection Plan, since December 26, 2007. Also, Hellerud's letter stated:

> ...[A]s you consider your options, please be mindful of the Employment Status provision of the UPS Flexible Benefits Summary Plan Description, which provides that employees who are absent from their regular occupation for 12 months (including time periods spent performing a residual disability assignment) will be administratively terminated regardless of their status on STD [Short Term Disability] or LTD [Long Term Disability]....

36. As Hellerud's letter reflected, UPS had a policy to terminate the employment of any employee who was "absent" from their regular occupation for 12 months. As set out in Hellerud's letter to Mason, this time computation included the time Mason had been designated as being on "temporary alternative work" and on workers' compensation leave, following her report of her knee injury in mid-June 2007.

37. Mason did not respond to Hellerud's letter, thinking it did not apply to her, because she was performing all of her work duties and had not been absent from her job, other than when on workers' compensation leave, and because she did not think of herself as disabled. There was no evidence that Mason even qualified for Short Term Disability under the Income Protection Plan. Mason had been working her normal hours earning her regular salary, with the exception of the period that she was on workers' compensation leave, receiving temporary disability payments under the workers' compensation system.

38. In early April 2008, UPS Riverside Business Manager Mike VanDamme learned for the first time that Mason had been designated as working on temporary alternate work and/or residual disability because she had restrictions. VanDamme did not know what the restrictions were, and had observed Mason performing all of her essential job functions. VanDamme informed Mason, however, that she had run out of "modified duty" days, so she would either have to get a full release from her doctor, removing her restrictions, or go out on workers' compensation leave.

39. On April 9, 2008, Mason was placed on workers' compensation leave, as she did not have a full release from her doctor.

40. Two days later, in a work status report dated April 11, 2008, Arrowhead Orthopedics recommended Mason "continue working modified duties with limited stooping, bending and kneeling." The report also stated, "If not available [Mason] will be temporarily totally disabled."

41. On April 14, 2008, Brenda Hellerud sent Mason another "ADA packet," essentially identical to that sent in July the prior year, in which the cover letter stated, "...we received notification that you requested a job-related accommodation...."

42. On April 18, 2008, Mason contacted Hellerud, telling her that the job description provided in the ADA packet was incorrect, and asking for a copy of her correct job description. Mason again called Hellerud on April 22, 2008, informing her that Dr. Grames was not available for a few days, so Mason needed more time to respond to the Request for Medical Information. Hellerud left a voicemail message in response, acknowledging Mason's call, and telling her that, nevertheless, an automatic reminder letter had been sent, and that "it's just a paperwork process."

43. On April 30, 2008, Mason saw Dr. Grames, informing him that she had been taken off work because there was no modified duty available for her. The work status report reflecting that visit provided that Mason "will continue working the same modified duties if [sic] not available she will be temporarily totally disabled."

44. On May 1, 2008, a staff member within Dr. Grames' office filled out UPS's Request for Medical Information form. Dr. Grames himself did not complete or sign the form. The form set out the medical procedures undertaken to address Mason's "chronic left

knee pain," including her surgery and after care, and noted that "she is able to perform all of her job duties," with the work restrictions of "limited stooping, bending and kneeling." On about May 1, 2008, Mason took the filled-out Request for Medical Information to UPS's Riverside location, placed it in an envelope with Brenda Hellerud's name on it, and asked that it be hand-delivered to Hellerud at the Ontario office. Mason believed, but was not positive, that the person she gave the envelope to was Nathan Rawls, and while it was not an unusual occurrence for staff to deliver documents to the Ontario Human Resources Office, Mason did not follow up to ensure that it had been received. At hearing, Hellerud contended she never received the form and that there was no copy of it in Mason's file.

45. On May 22, 2008, Hellerud sent Mason a letter informing her that her file had been closed and her request for a job-related accommodation had been withdrawn due to her failure to submit medical information. Mason was directed to contact the District Workforce Planning Manager [name not identified in the letter] if she had questions regarding her employment status.

46. Sometime in June 2008, UPS Human Relations Representative Darla Lloyd telephoned Mason at home. Lloyd asked Mason if she had talked to Helerud, telling Mason that she needed to turn in the medical documentation that Hellerud needed because Mason's employment at UPS could be terminated. Mason responded "Okay." Lloyd and Mason were friends, and Lloyd called because she was worried about Mason's job.

47. In June 2008, Dr. Grames scheduled another arthroscopy for Mason on her left knee. Mason informed Mike VanDamme about the scheduled surgery. Mason's work status report, dated June 11, 2008, stated that Mason could work, with the restrictions of "limited bending, stooping and kneeling," up until the scheduled surgery date of June 26, 2008. That same day, in a "Work Ability Report" completed by Dr. Grames' office, Mason was described as having been diagnosed with chronic left knee pain, degenerative arthritis and bursitis, with surgery scheduled for June 26, 2008. The filled-out Work Ability Report stated that Mason was able to work an eight-hour day, and was "frequently," 34-66% of the time, able to bend, kneel or stoop.

48. On June 26, 2008, Dr. Grames performed a second arthroscopy on Mason's left knee. There were no complications throughout the procedure. One week later, at her follow-up appointment with Dr. Grames on July 2, 2008, Mason was given the work status of "temporarily totally disabled."

49. On August 12, 2008, Hellerud inquired of Risk Management about Mason's work status. Hellerud was aware of Mason's recent surgery, and that Mason had a follow-up appointment with her doctor scheduled for the next day. The follow-up work status report from Dr. Grames, dated August 13, 2008, stated that Mason's work status for workers' compensation purposes was still "temporarily totally disabled." Mason was still on workers' compensation leave during this period, and received temporary disability payments. She had recently begun physical therapy, had received a knee brace, and was scheduled for her next follow-up appointment with Dr. Grames on September 22, 2008.

50. On August 20, 2008, Mason's current status for workers' compensation purposes was transmitted to Gallagher Bassett, including a notation that Mason's scheduled "recovery window" for her return to work was between July 10 and December 2, 2008.

51. In mid to late August 2008, Hellerud informed UPS's Human Resources Manager, Pat Donaldson, that Mason was "approaching more than a 12-month absence" from work and was still "temporarily totally disabled." At this point, Mason had been on her most recent workers' compensation leave for a period of just over four and one-half months.

52. On August 25, 2008, UPS decided to terminate Mason's employment, and sent a letter to Mason, under the signature of Patrick Donaldson, stating in part:

> Our records indicate that you have been absent from work for more than twelve months. As a result, your employment has been administratively terminated due to the length of your absence.

The letter stated the termination of Mason's employment was retroactively effective August 19, 2008.

53. In an email sent the day following Mason's termination letter, on August 26, 2008, Gallagher Bassett informed Hellerud of Mason's current status for workers' compensation purposes, including the scheduled "recovery window" for her return to work no later than December 2, 2008.

54. At the time of the termination of her employment, Mason's salary rate was $1,964 a month. She was also entitled to four weeks' vacation, and an annual bonus of half one month's salary, or $982 per year. Mason had also received health, dental and vision insurance while an employee of UPS. Up to 2008, UPS also made a three percent contribution to Mason's 401k plan.

55. Throughout Mason's employment, including after her July 2007 arthroscopic knee surgery, her performance was at all times satisfactory, and she had never received a negative performance review or a complaint against her. Accordingly, on receipt of the letter terminating her employment, Mason felt surprised and upset. She tried to contact Patrick Donaldson or Brenda Hellerud at UPS Human Relations, only to find that their voice mailboxes were full.

56. On receipt of UPS's letter terminating her employment, Mason was in a state of disbelief. She did not understand what had happened, and thought that there must be some kind of mistake. She could think of no logical reason that she would lose her job.

57. Following the termination of her employment at UPS, Mason was sad, angry and depressed, having been part of the UPS "family" and a diligent worker there for 10 years. Being fired was a blow to her ego. Suddenly having to depend on her husband to be the sole

provider made her feel insecure. Mason had worked since she was 14 years old, and had always prided herself on her independence. Following her firing, she became less motivated, neglecting to balance her checkbook and no longer caring about keeping her house clean. She had trouble sleeping. She stopped enjoying activities with her family, and was short-tempered with her children.

58. Mason's husband Derek observed Mason become withdrawn and unhappy as a result of losing her job. He was concerned that the loss of her job made her depressed and that she was emotionally "devastated." Her firing made no sense to either of them. They both knew that Mason had been working during the 12-month period when UPS said that she was "absent from work."

59. The family had been going through financial challenges even before Mason lost her job. The financial pressure intensified with the loss of Mason's job, although Mason continued to receive temporary disability payments of $690.12 every two weeks.

60. Following her last appointment with Dr. Grames in September 2008 (the reason Mason was no longer treated at Arrowhead Orthopedics was not disclosed in the record), Mason sought medical care at Community Medical Group of Riverside, Inc., Orthopedic Surgery and Rehabilitation. On November 4, 2008, Dr. B. D'Arc of Community Medical Group of Riverside, Inc. released Mason to return to work, with a restriction of "no squatting."

61. After her release to return to work by Community Medical Group, Mason felt ready to start looking for a job. She frequently searched for jobs online, applied in person at various locations, submitted written applications and took a number of tests, and followed up leads given to her by friends. She was at times discouraged, and did not look for work continuously, but at least every other week she tried to find work. Her job search, however, was unsuccessful.

62. On February 12, 2009, Mason was evaluated as "permanent and stationary" for worker's compensation purposes, meaning that she had reached maximum medical improvement for her left knee.

63. On February 16, 2009, six months after the termination of Mason's employment, Hellerud sent Mason another letter containing a form Request for Medical Information. Mason had not heard from anyone at UPS since receiving the August 25, 2008 letter terminating her employment. Because she did not know why she had received the letter, had not asked for accommodation, and had already been fired by UPS, Mason disregarded both Hellerud's February 16, 2009 letter and the follow-up reminder letter sent two weeks later.

64. On October 9, 2009, Mason was examined by Dr. Kanter, Agreed Medical Examiner, as part of her worker's compensation claim for her knee injury. Dr. Kanter prepared a report, titled Agreed Medical Examination, and issued on November 2, 2009, detailing Mason's diagnosis and treatment since her 2003 knee injury, and concluding that

Mason's left knee had a five percent strength impairment, and a two percent pain impairment. Dr. Kanter's report also found: "With regard to the left knee, [Mason] is precluded from prolonged kneeling or squatting, repetitively going up and down stairs or prolonged walking on uneven terrain."

65. Thereafter, on March 24, 2010, Mason's worker's compensation claims for her knee injury, and other injuries to her back and shoulder, were resolved with an agreed Stipulation and Award in the sum of $13,061.54, noting that Mason had received temporary disability payments up to March 26, 2009, "subject to proof," and that the award may be subject to a deduction for "TTD overpayment [$]1,972.00, subject to proof." At hearing, the undersigned administrative law judge took official notice of the Workers' Compensation Stipulation and Award, case number ADJ1672971 and ADJ3232950, approved by Workers' Compensation ALJ Catherine J. Coutts on March 24, 2010. (Cal. Code Regs., tit. 2, § 7431.)

66. At the time of hearing, Mason had found temporary employment with the United States Census as an Enumerator, helping people fill out census forms. The job was estimated to last a period of six to 10 weeks, at $16.75 per hour.

DETERMINATION OF ISSUES

Evidentiary Issues

At hearing, four evidentiary matters were either conditionally admitted or taken under submission, to give the parties the opportunity to address each in closing argument.

A. Request for Information From Mason's Medical Provider

First, the DFEH offered the Filled-Out Request for Medical Information dated May 1, 2008 (Exhibit 7), which Mason testified she submitted to her doctor's office to be completed, then had picked up later. Mason testified that she took the form to the UPS Riverside facility, placed it in an envelope, and handed it to a Human Resources employee, perhaps Nathan Rawls, asking him to deliver it to Hellerud. Hellerud disputed receipt.

UPS objected to admission on the basis that the handwriting was not authenticated, the document was hearsay, and irrelevant. The DFEH argued that the Request for Medical Information was admissible because it was sufficiently authenticated by Dr. Grames' testimony that it was a document generated by his office staff, bearing his stamped signature. The DFEH asserted that the form was both relevant and admissible as administrative hearsay, to corroborate, supplement or explain other evidence, here being Mason's testimony that she asked her doctor to fill out the medical form and that she took steps to get that form to UPS.

Dr. Grames' testimony was sufficient to authenticate Exhibit 7 as being a medical record relating to Mason that issued from his office under his clinic address and stamped

signature. Dr. Grames also testified that the document was prepared by his staff from Mason's medical records appearing in her patient chart. Moreover, the document itself is of a nature that is inherently reliable, as a medical record based on a patient's medical chart. (Cal. Code, tit. 2, § 7429, subd. (f)(3).)

Further, California Code of Regulations, title 2, section 7429, subdivision (f)(4), permits the use of hearsay evidence to "supplement or explain" other evidence. The doctrine, known as administrative hearsay, is appropriately invoked here to allow the admission of Exhibit 7.[2]

B. Facsimile Copy of OMS Position Statement With Hand-Written Annotations

The DFEH offered a facsimile copy of the OMS Position Statement with hand-written annotations on both the top and bottom (Exhibit 51). The DFEH asserted that the document had been sent by facsimile transmission to personnel in UPS's Human Resources on March 19, 2008, including Darla Lloyd and Jacqueline Eastman, and outlined Mason's work restrictions at the time of "limited stooping, bending and kneeling," with Dr. Grames' signature. UPS objected to admission of Exhibit 51 on the basis that the handwriting sections had not been authenticated and the document was hearsay, and thus should be excluded.

At hearing, Dr. Grames did not identify the handwritten notations on the document as his own writing or signature, although he testified that his staff prepared similar notes. Darla Lloyd, UPS Human Relations Representative, one of the intended recipients, testified that she did not recall receiving the document, but certified her handwriting appeared at the top. The document bears the facsimile imprint of "UPS Ontario HR" and the date "03/19/2008." Darla Lloyd testified that the facsimile numbers were accurate. The hand-written notation on the bottom of the page stating Ms. Mason's restrictions of "limited stooping, bending and kneeling" echo those reflected in the work status report issued by Dr. Grames' office on March 19, 2008. The document was apparently produced by UPS in discovery in this matter. It is sufficiently authenticated, and is relevant for the non-hearsay purpose of showing notice to UPS of the medical restrictions. Thus, Exhibit 51 is admissible, including the handwritten notations reflecting notice to UPS of Mason's medical restrictions in March 2008.

C. Dr. Kanter's Agreed Medical Examiner (AME) Report

UPS offered a copy of the AME report issued by Dr. Kanter on November 2, 2009, as part of Mason's workers' compensation case. This is a voluminous document summarizing Mason's medical history relating to her 2003 on-the-job injury to her knee. UPS's asserted that the AME report established that Mason was not ready to return to work after the

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[2] While this decision finds credible Mason's claim that she had her doctor's office fill out Exhibit 7, Hellerud testified that it was not located in the files that she maintained, raising the issue of whether it was ever delivered to Hellerud.

termination of her employment, notwithstanding her testimony that she could do her job and is thus admissible to impeach Masons' testimony. UPS also asserted that the AME report should be admitted because "it is the sort of serious evidence on which responsible persons are accustomed to rely in the conduct of serious affairs." (Cal. Code, tit. 2, § 7429, subd. (f)(3).)

The DFEH objected to admission of the AME report on the basis that it was uncorroborated administrative hearsay. This decision disagrees. As noted above, hearsay evidence is permitted to "supplement or explain" other evidence. (Cal. Code, tit. 2, § 7429, subd. (f)(4).) And here, the AME report supplements the medical records in this case, adding context and explaining several of those records, such as several previously unexplained, missing Arrowhead Orthopedics work status reports for Mason's early visits with Dr. Grames. Moreover, the AME report explains the mistake in the records concerning the reporting of Mason as "temporarily totally disabled" in July 2007, clarifying that work status report was in error, and was subsequently corrected. Accordingly, Dr. Kanter's AME report is deemed reliable and found to be admissible to supplement and explain other testimony and documentary evidence admitted in this case.[3]

Liability

The DFEH alleges that respondent UPS discriminated against complainant Mason on the basis of actual and perceived disability, by barring her from work and terminating her employment, in violation of Government Code section 12940, subdivision (a). The DFEH also alleges that UPS failed to engage in an individualized interactive process, in violation of Government Code section 12940, subdivision (n), and failed to provide reasonable accommodation for Mason, in violation of Government Code section 12940, subdivision (m). The DFEH further alleges that UPS failed to take all reasonable steps necessary to prevent discrimination from occurring, in violation of Government Code section 12940, subdivision (k).

UPS denies any liability under the FEHA, asserting that it terminated complainant's employment because she was unable to perform her essential job functions as an Operations Management Specialist. UPS also contends that Mason's medical restrictions prohibited her from performing her job duties, and that Mason thwarted all of UPS' efforts to accommodate her. Moreover, UPS asserts that Mason exceeded the maximum 12 months of residual duty permitted under UPS's Flexible Benefits Plan, and that UPS thereby established a legitimate, non-discriminatory reason for its termination of Mason's employment. UPS also asserts that

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[3] At hearing, UPS also offered the workers' compensation stipulation and award entered into by Mason and UPS's carrier to resolve Mason's claim for her knee injury (Exhibit 77). At hearing, official notice was taken of the stipulation and award, which was approved by Judge Catherine J. Coutts on March 24, 2010. (Cal. Code Regs., tit. 2, § 7431.) The DFEH concedes that the amount of the award is relevant to mitigation, but only for those payments designated for temporary disability, replacing wage loss. Given that the stipulation and award provides a judicial context to Mason's workers' compensation claim, and provides evidence of mitigation through Mason's receipt of temporary disability payments, its relevance is established.

its policies and practices, as applied to Mason, were fully compliant with the FEHA and that UPS, through its comprehensive policies and training, took all reasonable steps to prevent discrimination from occurring.

A. Discrimination on Basis of Disability (Gov. Code, § 12940, subd. (a))

Under the FEHA, it is unlawful for an employer, because of the physical disability of any person, to bar the person from employment, absent an affirmative defense. (Gov. Code § 12940, subd. (a)(1).) Discrimination is established if it is determined that a preponderance of all the evidence demonstrates a causal connection between a complainant's physical disability and an adverse action taken against her by respondent. The evidence need not demonstrate that complainant's perceived disability was the sole or even the dominant cause of her adverse treatment. Discrimination is established if disability was at least one of the factors that influenced respondent. (*Dept. Fair Empl. & Hous. v. Aluminum Precision Products, Inc.* (Mar. 10, 1988) No. 88-05, FEHC Precedential Decs. 1988-89, CEB 4, at p. 5 [1988 WL 242635 (Cal.F.E.H.C.)]; *Dept. Fair Empl. & Hous. v. Kingsburg Cotton Oil Co.* (Dec. 7, 1984) No. 84-30, FEHC Precedential Decs. 1984-85, CEB 11, at p. 21 [1984 WL 54310 (Cal.F.E.H.C.)]; Cal. Code of Regs., tit. 2, § 7293.7.)

1. Whether Mason Had a Disability Under the FEHA

The DFEH contends that Mason's knee injury constituted an actual disability when she was precluded from the major life activity of working. The DFEH also contends that, for the balance of Mason's employment after reporting her knee injury in June 2007, including and up to the termination of her employment, Mason was perceived as being disabled by UPS.

UPS contends that the DFEH cannot establish that Mason had an actual disability, because she testified that she was able to perform all of her work duties. UPS does not address the legal theory of whether Mason was perceived or regarded as disabled.

Under the FEHA, "physical disability" includes, in relevant part, having a disorder which: 1) affects the musculoskeletal system, and 2) limits an individual's ability to participate in major life activities. (Gov. Code, § 12926, subd. (k)(1).) "Physical disability" also includes "being regarded or treated" as having or having had such a disorder (Gov. Code § 12926, subd. (k)(4)) and protects against the perception that an individual is disabled. (Gov. Code, § 12926, subd. (m).) Thus, the Act forbids discrimination against individuals who have a actual physical disability or who are regarded, treated or perceived as though they have or had such a physical disability. (Gov. Code, §§ 12926, subds. (k)(4) and (m), and 12940, subd. (a); *Gelfo v. Lockheed Martin* (2006) 140 Cal. App.4th 34, 53.)

The record established that in 2007, Mason had a meniscus tear in her left knee, aggravating an on-the-job injury sustained in 2003. She underwent two arthroscopic surgical procedures, on October 14, 2007, and June 26, 2008, from which she progressively recovered, and was released to return to work, with restrictions, after each procedure. When

medically placed off work following the first surgery, during the period from October 14 to December 27, 2007, Mason was medically precluded from the major life activity of working, and was thus, at that time, actually disabled under the Act. (Gov. Code, § 12926, subd. (k)(1).) Similarly, following the second arthroscopy performed by Dr. Grames on June 26, 2008, until her release to return to work in November 2008, Mason was once again medically precluded from the major life activity of working and was, thus, actually disabled under the FEHA during this period also. (Gov. Code, § 12926, subd. (k)(1).)[4] During the periods of actual disability established in the record, Mason was on workers' compensation leave, and can be viewed as having been "accommodated" in effect by virtue of that leave. This is then, predominantly a "perceived disability" case, focusing on the periods after Mason reported her knee injury in June 2007, was released to return to work following her knee arthroscopy in December 2007, and until the termination of her employment by UPS in August 2008.

The record also showed that once Mason reported her knee injury to UPS, she was placed on a status of "temporary alternate work" due to her work restrictions, because UPS believed that she was unable to perform her regular job duties. UPS's view that Mason was unable to do her job remained unchanged, even as her medical restrictions issued by Dr. Grames became progressively less limiting.

This evidence showed that UPS regarded Mason as a person with a physical disability, her left knee injury, because of Dr. Grames' work restrictions. Thus, based on this record, the DFEH established that Mason was a person with a physical disability, within the meaning of the Act. (Gov. Code §§ 12926, subds. (k)(1), (k)(4) and (m), and 12940, subd. (a).)

2. Whether Mason Was Able to Perform Her Essential Job Duties With or Without Accommodation

The DFEH asserts that, at all relevant times, Mason was able to perform her essential job functions. UPS, meanwhile, asserts that Mason is not entitled to the protections of the FEHA's proscriptions against disability discrimination because the DFEH cannot establish that Mason was "a qualified individual with a disability," able to perform her essential job functions with or without reasonable accommodation.

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[4] UPS asserts that the DFEH cannot establish an actual disability because Mason made "judicial admissions" that she could perform all of her job duties. This argument is not supported by a careful review of the record. In its proper temporal context, Mason's credible and consistent testimony was that she was able to do all of her job functions both prior to her surgery and when she returned to work after receiving a medical release from her doctor.

UPS also asserts that, at hearing, Mason "admitted that she had been unable to perform the essential functions of her job since June 15, 2007." The record does not support this reading of Mason's testimony. She was questioned, on cross-examination by UPS's counsel, about Hellerud's Nine-Month letter concerning residual disability. After reading two sentences from Hellerud's letter, counsel asked "Do you disagree with that sentence?" The question, and the response, were ambiguous, and insufficient to refute Mason's steadfast assertion that, when at work following her June 15, 2007 injury, she was performing all of her job duties.

Under the FEHA, an employer may refuse to hire or terminate an employee with a physical disability "[w]here the employee, because of his or her physical or mental disability, is unable to perform his or her essential duties even with reasonable accommodations ...." (Gov. Code § 12940, subd. (a)(1); Cal. Code Regs., tit. 2, § 7293.8, subd.(a); *Cassista v. Community Foods, Inc.* (1993) 5 Cal.4th 1050, 1056.) To prove disability discrimination under the FEHA, the DFEH must establish that Mason was a qualified individual with a disability, i.e., that she could perform the "essential functions" of the job as an Operations Management Specialist with or without reasonable accommodation. (*Green v. Sup. Ct.* (2007) 42 Cal. 4th 254, 262; *Dept. Fair Empl. & Hous. v. City of Fullerton* (May 6, 2008) No. 08-04-P [2008 WL 2335108, at p. *10 (Cal.F.E.H.C.)].)

The first step in assessing an individual's ability to perform the essential job functions of a position, with or without reasonable accommodation, is to determine what those essential job functions are. Government Code section 12926, subdivision (f), defines "essential functions" as "the fundamental job duties of the employment position that the individual holds or desires." Factors to be considered in determining the essential functions of a particular job include any pre-existing written job descriptions, the time spent on the job allocated to and actually performing the function, the consequences of not requiring the incumbent to perform the function, the terms of a collective bargaining agreement, and the work experience of past incumbents in the job and current incumbents in similar jobs. (Gov. Code, § 12926, subd. (f).) Essential functions do not include those functions that are marginal. (*Ibid.*)

The evidence presented at hearing established that the fundamental job function of the Operations Management Specialist position was to address and resolve concerns and complaints raised by UPS customers.[5] This core function was accomplished primarily by communicating with customers, either on the telephone or by computer. It was predominantly a desk job, requiring being seated for most of the work shift. The record showed that this key duty, dealing with customers' concerns, which was predominantly sedentary, comprised more than 75% of Mason's work shift. The job also included intermittent walking within the warehouse facility, whether to deliver a message or to locate a package, if an hourly clerical worker was not available. Leaving her desk and the Operations Management Specialist office to walk around the warehouse could comprise up to 25% of physical activities required of Mason during a given shift, of which locating packages was just an occasional task, when no clerk was available. The DFEH established that the hourly clerks were responsible for the handling and advancing of packages, and could file a grievance, as provided in their collective bargaining agreement, in the event a

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[5] UPS introduced a document entitled "Essential Job Functions" (the OMS Position Statement) which listed the physical criteria that UPS contends are "essential" to perform the Operations Management Specialist job. The document is neither a job description nor a duty statement (nor did UPS maintain one), so is accorded very little weight in establishing the fundamental job duties of the Operations Management Specialist position. The document does provide some guidance, however, on the physical attributes that UPS asserted were required of its employees in the position. On the other hand, while lifting up to 70 pounds was a listed physical requirement, the record did not reflect that, in practice, Operations Management Specialists actually were required to do heavy lifting as part of their job duties.

non-hourly employee performed that task. In sum, applying the FEHA's "essential functions" factors, the record established that the physical handling of packages was a marginal, non-essential function of the Operations Management Specialist position.

Turning now to the evidence reflecting Mason's ability to perform her essential job functions, the record established that her medical condition was not static, as she progressively improved following her surgery. At first, for about a month after her return from the October arthroscopy, she testified that she used a cane and walked with a limp, at times elevated her left leg on a chair while working, and that her work colleagues on occasion offered to help her.[6] In the months that followed, Mason credibly testified that she was able to perform all of her job duties. Mike VanDamme, who took over as Business Manager at the Riverside facility in January 2008, testified that he observed Mason for several months doing all of her job duties, and was not even aware that she had any medical restrictions. The record showed that Mason received no negative performance evaluations or complaints that she was not performing her job.

Notwithstanding Mason's demonstrated ability to perform her essential job functions, UPS argues that the DFEH cannot establish whether Mason is a "qualified" individual with a disability because she made it "impossible" for UPS to determine whether she could perform her job *with* an accommodation, by not responding to the ADA packets. This argument is unpersuasive. It defies common sense to require an employee who is regarded as disabled to demand accommodation in order to show that a reasonable accommodation was available when the employee is not even aware of the employer's contention that the employee is disabled. The employee cannot reasonably be expected to read the employer's mind. This is indeed what the interactive process is designed to address. (Gov. Code, § 12940, subd. (n).)[7]

Further, respondent conflates the "real world" workplace context of the interactive process with the DFEH's burden of proof during the litigation process. This is not what the law requires. It is both impractical and unreasonable to expect an employee in the workplace to anticipate and address the legal hurdles involved in the litigation phase of a disability case. This is particularly true given the imbalance in knowledge and access to information between employee and employer. (See *Jensen v. Wells Fargo Bank* (2000) 85 Cal.App.4th 245, 262 (*Jensen*); *Scotch v. Art Institute of California-Orange County* (2009) 173 Cal.App.4th 986, 995; *Wysinger v. Automobile Club of Southern California* (2007) 157 Cal.App.4th 413, 425, citing *Jensen, supra,* 85 Cal.App.4th at p. 262.)

Moreover, the DFEH identified some of the types of accommodations that the record established could have been available to accommodate Mason, such as assigning some tasks

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6 UPS asserts that Mason's permitting her co-workers to help her voluntarily in the early weeks after her return to work established that she was unable to perform her essential job functions. Contrary to UPS's assertion, this informal arrangement tends to show that this kind of accommodation could have been available for Mason at that time.

7 It is not unreasonable for Mason to conclude that she did not have to respond to Hellerud's ADA packets, as the form cover letter recited that Mason had "requested a job-related accommodation," when she had not done so.

to Mason's co-workers when Mason was restricted to "sedentary work," and ensuring that either the hourly clerks or other workers dealt with handling packages. As discussed above, this decision finds that handling packages was not an essential job function of the Operations Management Specialist, and was properly the province of the hourly clerical employees.

Thus, based on the evidence adduced at hearing, the DFEH demonstrated that Mason was able to perform her essential job functions as an Operations Management Specialist, with or without accommodation.

3. UPS's Termination of Mason's Employment

The DFEH asserts that UPS's decision to terminate Mason's employment by invoking its administrative termination rule under the Flexible Benefits Plan was based on Mason's disability and was thus discriminatory, in violation of Government Code section 12940, subdivision (a). The DFEH contends that the rule was invoked as a pretext, and was applied arbitrarily to justify the violation of Mason's rights under the FEHA.

UPS contends that it "bent over backwards" to accommodate Mason's needs as a disabled employee, and terminated her employment under its administrative termination policy only after Mason had been out on leave for 12 months, unable to perform her job duties for the entirety of that period. UPS thus argues that it had a legitimate, non-discriminatory reason for its termination of Mason's employment.

The record showed that, although Mason was performing her job duties following her report of her injury in June 2007, and after her release to return to work in late December 2007, UPS nonetheless deemed her to be on "temporary alternative work." This designation lacked any correlation with the reality of Mason's job performance, which was without any reported performance deficiencies or failure to perform any of her duties. The record showed that, from January to April 2008, Building Manager VanDamme observed Mason to be performing her regular job functions satisfactorily. And Mason credibly testified that she was performing her regular duties.[8] Thus, the record does not support UPS's argument that Mason was not performing her Operations Management Specialist job duties for the entire 12-month period that UPS counted as "residual disability."

The evidence indicated that UPS used the designation "residual disability" where an employee had medical restrictions and as a result, was deemed by UPS to be unable to perform his or her essential functions. In Mason's case, UPS failed to undertake a "case-by-case" individualized assessment to determine whether Mason's restrictions were incompatible with her job duties and whether in fact she was performing her essential job functions. Moreover, UPS placed Mason on "temporary alternate work," then out on leave once she had "run out" of modified duty days, "without exploring any other options with

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[8] This does not include the periods Mason was placed out on leave, from August to December 2007, and from April to August 2008.

[Mason] in a meaningful way." (See *Prilliman v. United Air Lines, Inc.* (53 Cal.App.4th 935, 951.) UPS also failed to take into account the period of time Mason was on the job, performing all of her duties. Thus, UPS's unilateral designation that Mason was on residual disability, without regard for her progressive improvement and lessening of her medical restrictions, and without an individualized assessment of her options led to her eventual termination under the 12-month administrative termination rule.

The record showed that for Mason to navigate out of residual disability status, and avoid termination after 12 months, she would have needed to have her medical restrictions cleared.[9] The use of UPS's ADA process, even if Mason had realized she *had* to ask for an accommodation to keep her job, would not necessarily grant Mason a reprieve because there was no assurance that the 12-month termination rule would be suspended. Mason would have to proceed through UPS's 10-Step ADA process, where UPS could well have taken the position (as it did at hearing) that Mason did not have a disability, and thus, was not entitled to reasonable accommodation. And, even if UPS had decided to extend an accommodation to Mason, there was no guarantee that the clock on the 12-month administrative termination would be stopped. As Human Resource Manager, Christine Castaldi-Inman testified at her deposition in this case,

> If the position is being temporarily modified, then that position, that time [sic] still would count. If we had already gone through the accommodation process and deem the accommodation to be what we were going to have going forward, then the – it's possible that the – the residual disability would stop, but it wouldn't stop necessarily on every case.

In sum, the evidence established that UPS treated Mason as having a disability because she had medical restrictions, regardless of whether the restrictions were, in fact, consistent with her ability to do her job, and notwithstanding that Mason was actually performing her essential job duties. The evidence also established that UPS's continuing perception that Mason was disabled as long as she still had medical restrictions inexorably ran out the 12-month clock, providing UPS with its excuse to terminate her employment. Thus, the underlying motivating reason for Mason's firing was shown at hearing to be UPS's regarding and treating Mason as disabled.

Accordingly, this decision finds that UPS's invocation of its 12-month administrative termination policy to terminate Mason's employment was a pretext for UPS's discriminatory

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9 This decision credits that Mason's supervisor VanDamme informed Mason in April 2008 that she needed to get a full release from her doctor or be placed out on worker's compensation leave. Requiring an employee after injury or with a disability to get a "full release" i.e., to be "100%" able to perform all tasks, does not provide an opportunity to assess, on an individual basis, whether the employee can be reasonably accommodated to perform essential tasks. (See *McGregor v. Nat'l Railroad Passenger Corp. aka Amtrak* (9th Cir. 1999) 187 F.3d 1113, 1116 ["A '100% healed' or fully healed' policy discriminates against qualified individuals with disabilities because such a policy permits employers to substitute a determination of whether a qualified individual is 'healed' from their injury for a required individual assessment whether the qualified individual is able to perform the essential functions of his or her job either with or without accommodation."].)

termination of Mason's employment based on her disability. Thus, the DFEH established that UPS violated Government Code section 12940, subdivision (a).

B. Failure to Engage in the Interactive Process (Gov. Code, § 12940, subd. (n)

The DFEH also charges that UPS failed to engage in the interactive process, by playing "lip service to the interactive process requirements, while ignoring the true spirit of what the interactive process is meant to accomplish," in violation of Government Code section 12940, subdivision (n). UPS counters that it made "every effort" to engage Mason in the interactive process, by repeatedly taking the initiative, but that Mason ignored all of UPS's efforts.

The FEHA provides that it is an unlawful employment practice for an employer "to fail to engage in a timely, good faith, interactive process with the employee or applicant to determine effective reasonable accommodations, if any, in response to a request for reasonable accommodation by an employee or applicant with a known physical or mental disability or known medical condition." (Gov. Code, § 12940, subd. (n), *Jensen, supra,* 85 Cal.App.4th at pp. 262-263.)

The employer's obligation to begin an interactive process is generally triggered once the employee requests a reasonable accommodation. (Gov. Code, § 12940, subd. (n), *Jensen, supra*, 85 Cal.App.4th at p. 261.) The goal of the interactive process is to determine which accommodation is required. (*Jensen, supra*, 85 Cal.App.4th at p. 263, fn 7.) In a case involving perceived disability, such as this case, where the employee does not believe that he or she requires any accommodation and is not even aware that the employer regards him or her having a disability, there is an equally compelling need for the parties to engage mutually in the interactive process. As the court noted in *Gelfo v. Lockheed Martin, supra,* 140 Cal. App.4th at p. 61, "the argument for enforcing a duty to engage in a discussion may be more compelling in the context of the interactive process" where an employee is "merely 'regarded as' disabled." Meaningful communication between the parties in an interactive dialogue with a relevant exchange of information could enable the employer to recognize, for example, that no accommodation is required for the employee to perform his or her job duties. Or, it could educate the employee to recognize that the employer regards him or her as disabled, and allow the parties to work collaboratively to permit the employee to continue working his or her job.

The DFEH argues that UPS's ADA procedure was so "automated" and "form-run" as to obviate an "individualized, effective interactive process." The DFEH contends that UPS was on notice of the need to engage in the interactive process with Mason when it received notice of her restrictions and determined to put her out on leave because it was not going to permit her to continue working on "temporary alternate work." According to the DFEH, UPS made no effort to engage in a meaningful interactive process by, for example, explaining to Mason why she was being placed on leave in April 2008, why she could not continue in her position, or exploring why an accommodation other than placing her on leave

was needed or available. The DFEH points out that neither Brenda Hellerud nor Mason's supervisor Mike VanDamme "ever discussed [Mason's] restrictions with her..."

The DFEH further contends that UPS was under a duty to engage Mason in the interactive process again in August 2008, prior to UPS's decision to terminate her employment. The DFEH asserts that UPS was regularly in receipt of medical updates concerning Mason's condition, via the work status reports, and emails from Gallagher Bassett summarizing Mason's status, which were sufficient to trigger the duty to engage in the interactive process, particularly in August 2008, prior to UPS's making the decision to terminate Mason's employment.

The DFEH further argues that UPS, by insisting that the exclusive framework for a dialogue about accommodation was by the employee and the medical provider responding with the completed forms in the ADA packet, imposed "UPS's own specific version of the interactive process or no interactive process at all."

UPS sees the situation differently, contending that it repeatedly attempted to engage Mason in the interactive process, by notifying her three times that it "believed she could not do her essential job functions," but that Mason simply ignored all of these attempts. Thus, UPS asserts that it initiated the interactive process, but that Mason failed to cooperate.[10]

Once an employer initiates an interactive process, the employer and employee each "must participate in good faith, undertaking reasonable efforts to communicate its concerns, and make available to the other information which is more available, or accessible, to one party." (*Jensen, supra*, 85 Cal.App.4th at p. 266.)

UPS asserts that it initiated the interactive process, relying on the various letters Hellerud sent Mason, including the ADA packets stating, erroneously, that Mason had requested accommodation. The record showed that, on receipt of these letters, Mason considered that they did not apply to her. When she received the first ADA packet, Mason was working her full job duties. On receipt of the next ADA packet, she was on workers' compensation leave. In the case of the last ADA packet, on February 9, 2009, Mason had been fired six months earlier. Thus, given the timing of each of the ADA packets, together with their factual inaccuracy, stating that the packets were being sent because Mason had "requested" accommodation, it was not unreasonable for Mason to think they did not apply to her, particularly as she had not made any request for accommodation. Also, as the DFEH points out, the letters were in the style of automated form letters, reflecting Hellerud's rigid adherence to the "paperwork process." On this record, it cannot be said that UPS's letters were "effective" in communicating its concerns and issues to Mason in a manner reasonably

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[10] In its closing brief, UPS cites *Milan v. City of Holtville*, 2010 WL 2524578. On September 29, 2010, subsequent to respondent's brief being filed with the Commission, the California Supreme Court denied review of that case and ordered that the opinion not be officially published. Accordingly, all references to *Milan v. City of Holtville* in UPS's brief are disregarded.

calculated to engage her in the interactive process, and to apprise her of a need to work collaboratively with UPS to resolve any accommodation issues.

Further, "[t]he hallmark of [the] FEHA is the flexibility it requires of employers to work with its disabled employees to accommodate their needs." (*Prilliman v. United Air Lines, Inc.*, *supra,* 53 Cal.App.4th at pp. 151-152 [citation omitted].) The record showed that these overtures by UPS to open up the kind of dialogue envisioned in the interactive process were flawed, not only because they lacked flexibility, but also because there was a demonstrable lack of effort to address Mason's specific circumstances. Where an employer relies on formulaic, boilerplate letters not accurately reflecting the employees' circumstances, the employer assumes a risk that the letters may fail in their purpose. It is significant that this is not a case where Mason thought that she needed any accommodation, for the simple reason that she believed that she was doing her job. The "need" for accommodation was only apparent to UPS. Thus, the disconnect between UPS's regarding Mason as having a disability, UPS's erroneous statements that Mason had "requested" accommodation, and Mason's determination that she needed no accommodation, all contributed to and compounded the lack of effective communication.

Nevertheless, this decision finds that, notwithstanding the flawed process instigated by UPS, Mason did not discharge her mutual duty to cooperate in the interactive process. At a minimum, Mason could have communicated her confusion to Hellerud on receipt of the ADA packet, to explain that she had not asked for accommodation and did not feel she needed one. This potentially could have placated Hellerud or permitted Hellerud to explain, in turn, why it was important for Mason to comply with UPS's process, even though Mason believed it did not apply to her.

After Mason had Arrowhead Orthopedics fill out the Request for Medical Information demanded by Hellerud (and UPS's 10-Step ADA Process), the record showed that Mason did not take reasonable steps to ensure its receipt, handing it to a co-worker for hand-delivery, yet not following up with Hellerud to make sure she got the form, particularly after receipt of Hellerud's May 22, 2008 letter, stating that the file was being closed because no medical information had been received. The record showed that, rather than proactively protecting her rights, Mason remained passive and unresponsive.

Under these circumstances, this decision finds that there was a mutual failure to engage in the interactive process, with a portion of fault assignable to each party. Thus, UPS will not be held liable for violation of Government Code section 12940, subdivision (n).

C. Failure to Provide Reasonable Accommodation (Gov. Code § 12940, subd. (m))

The accusation also includes a charge that UPS violated its duty to provide Mason with reasonable accommodation. (Gov. Code § 12940, subd. (m).) However, the DFEH argues in its closing brief that Mason did not need any accommodation as she was able to perform all of her job duties when working as an Operation Management Specialist at UPS.

This is consistent with Mason's testimony that she neither wanted nor requested accommodation.

Under these circumstances, UPS is not found to be liable for a violation of Code section 12940, subdivision (n).

D. Failure to Take All Reasonable Steps Necessary To Prevent Discrimination (Gov. Code § 12940, subd. (k))

The DFEH also charges that UPS violated the Act by failing in its affirmative duty, under Government Code section 12940, subdivision (k), to take all reasonable steps necessary to prevent discrimination from occurring. UPS counters that the DFEH cannot sustain such a claim, since there was no underlying discrimination, citing *Trujillo v. N. County Transit Dist.* (1998) 63 Cal.App.4th 280, 288-89.[11]

Here, the DFEH established that UPS failed to take all reasonable steps necessary to prevent discrimination from occurring by improperly treating complainant as disabled and terminating her employment because she had medical restrictions, in violation of Government Code 12940, subdivision (a). The application of the 12-month 'administrative termination" rule to fire Mason underscored UPS's lack of flexibility and disregard for an individualized assessment of the needs of employees with disabilities.

The DFEH also points to the inadequacies in respondent's ADA Compliance Manual, with its focus on federal law and not California's FEHA, and the need for ongoing training of its managers and supervisors in California on the FEHA.[12]

With this record, the DFEH has established that UPS is liable for violation of Government Code section 12940, subdivision (k), for failing to take all reasonable steps necessary to prevent discrimination from occurring.

REMEDY

Having established that UPS violated the Act, the DFEH is entitled to whatever forms of relief are necessary to make complainant whole for any loss or injury she suffered as a result. The DFEH must demonstrate, where necessary, the nature and extent of the resultant

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[11] Cf. *Dept. Fair Empl. & Hous.v. Lyddan Law Group, LLP.* (October 19, 2010) No. 10-04-P [2010 WL 4901732, at *16 (Cal.F.E.H.C.), holding that the DFEH may prosecute a "stand alone" violation of Government Code section 12940, subdivision (k).

[12] The DFEH alleges in its closing brief that UPS's Request for Medical Information promulgated as part of the ADA packet "may" constitute unlawful medical inquiries, in violation of Government Code section 12940, subdivision (f). However, because these charges were not set out in the accusation, this issue is not reached in this decision.

injury, and respondent must demonstrate any bar or excuse it asserts to any part of these remedies. (Gov. Code, § 12970, subd. (a); Cal. Code Regs., tit. 2, § 7286.9; *Donald Schriver, Inc. v. Fair Empl. & Hous. Com.* (1986) 220 Cal.App.3d 396, 407; *Dept. Fair Empl. & Hous. v. Madera County* (Apr. 26, 1990) No. 90-03, FEHC Precedential Decs. 1990-91, CEB 1, pp. 33-34 [1990 WL 312871 (Cal.F.E.H.C.)].)

The DFEH's accusation sought back pay, reinstatement and/or front pay, compensatory damages for complainant's emotional distress, an administrative fine, and affirmative relief.

A. Back Pay

Mason is entitled to receive back pay for the wages she otherwise could have been expected to earn but for UPS's violation of the Act. (*Donald Schriver, Inc. v. Fair Empl. & Hous. Com.*, *supra*, 220 Cal.App.3d at p. 407.)

The DFEH seeks an award of the lost earnings, benefits and bonuses that Mason would have earned from the date of her medical release to return to work on November 4, 2008, up to the date of hearing, a period of 79 weeks.[13]

UPS disagrees, arguing that no back pay award is warranted, because Mason ignored the ADA packet UPS sent Mason in February 2009, after she had been fired. In support of its argument, UPS cites *Ford Motor Co. v. E.E.O.C.* (1982) 458 U.S. 219, 232, for the proposition that employers "can toll the accrual of back pay liability by unconditionally offering the claimant the job he sought, and thereby providing him with an opportunity to minimize damages." In this case, however, the ADA packet was, at most, a request for information about potential accommodation. UPS failed to establish that it was an unconditional offer of reinstatement. Thus, the *Ford Motor Co. v. E.E.O.C.* doctrine is inapposite.

UPS next asserts that the DFEH failed to establish that Mason "exercised reasonable diligence" in seeking a comparable job. The burden is on the employer to establish an employee's failure to mitigate his or her earnings lack of mitigation, including demonstrating the availability of comparable or substantially similar positions. (*Parker v. Twentieth Century-Fox Film Corp.* (1970) 3 Cal.3d 176, 181-182; *Donald Schriver, Inc. v. Fair Empl.*

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[13] The DFEH also seeks Mason's lost earnings after she was placed on leave from April 10, 2008, up until her surgery, i.e. to June 25, 2008, a period of 10 weeks. The hearing record, however, was insufficient to find that complainant's workers' compensation leave violated the FEHA. Thus, no lost earnings are awarded for the leave period sought by the DFEH. Moreover, even is such an award were made, it would be also appropriately be offset by the amounts Mason received in temporary disability payments, which compensate for wage loss. (See *Sea-Land Service, Inc. v. Worker's Comp. Appeals Bd.* (1996) 14 Cal.4th 76, 87.) "Temporary disability indemnity serves as wage replacement during the injured worker's healing period for the industrial injury. In contrast, permanent disability indemnity compensates for residual handicap and/or impairment of function after maximum recovery from the effects of the industrial injury have been attained." (*Ibid*, citing *Maples v. Workers' Comp. Appeals Bd.* (1980) 111 Cal. App.3d 827, 836-837.)

& Hous. Com., supra, 220 Cal.App.3d at p. 407.) UPS failed to meet that burden here. The record established that, once she was released to work in November 2009, Mason looked for positions on line, underwent job testing, followed up on referrals from friends, and submitted job applications, thus exercising reasonable diligence to try and find work.

UPS also asserts that Mason is not entitled to back pay because she was "totally temporarily disabled" for workers' compensation purposes, receiving $690.12 every two weeks in workers' compensation temporary disability benefits. While noting that "totally temporarily disabled" under workers' compensation law is separate and distinct from the specific definitions of what constitutes disability under the FEHA, this decision agrees with UPS that an offset for temporary disability benefits paid to Mason as part of her workers' compensation case to compensate for wage loss is appropriate. Equitable principles do not permit double recovery. (*City of Moorpark v. Sup. Ct.* (1998) 18 Cal.4th 1143, 1156.) The DFEH also recognizes that an offset for the temporary disability benefits is appropriate.

The record indicates payment of temporary disability benefits to compensate for Mason's wage loss up to March 26, 2009[14], based on the Workers' Compensation Stipulation and Award, approved by the Workers' Compensation judge. Thus, this decision shall offset these temporary indemnity payments from Mason's claimed wage loss.

Dates	Weeks	Back Pay @ $453.23 per week	TTD Payments @ $345.06 per week	Total
11/4/08 – 3/26/09	20	$ 9,064.60	($6,901.20)	$ 2,163.40
3/27/09 – 5/12/10	58	$26,287.34	n/a	$26,287.34
Total	78	$35,351.94	($6,901.20)	$28,450.74

Accordingly, this decision finds that Mason's back pay entitlement from November 4, 2008, when she was released to return to work, to the first day of hearing, May 12, 2010, a period of 78 weeks, is in the amount of $35,351.94, less temporary disability payments received, in the sum of $6,901.20, for a total back pay award in the amount of $28,450.74. Mason is also entitled to the vacation pay that she would have accrued in this same period, calculated at 1.5 years times 4 weeks times her pay rate of $453.23, in the sum of $2,719.38, for a total amount of lost earnings of $31,170.12[15] Interest will accrue on this amount, at the rate of ten percent per year, compounded annually, from the date the earnings accrued until the date of payment.

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[14] Next to the date of March 29, 2009, there is the handwritten annotation "subject to proof," indicating a lack of certainty on the duration of the TTD payments, and a possible future adjustment. Without more in the record, however, this decision will conform to the Workers' Compensation Appeals Board award.

[15] The DFEH also seeks the payment of two post-termination annual bonuses, in 2009 and 2010, based on the fact that Mason had been paid bonuses in past years. However, because the record did not sufficiently establish that the bonuses were in fact paid in 2009 and 2010, no such award is made. Similarly, the evidence did not support a finding that Mason was out of pocket for lost health, vision or dental benefits, as the evidence established that she was able to get coverage for herself and her children under her husband's health insurance scheme. Accordingly, these claimed lost benefits are not awarded.

B. Reinstatement and Post-Hearing Wage Loss

The DFEH seeks reinstatement for Mason to her Operations Management Specialist position at UPS. This proposed decision orders that respondent offer Mason reinstatement into her former position as an Operations Management Specialist, or a substantially comparable position, and to grant her all seniority, status, and other terms, conditions and privileges of employment that would have accrued to her had she not been terminated. Complainant shall have 10 days from the date of respondent's offer of reinstatement to accept or reject reinstatement.

Respondent and the DFEH shall be ordered to meet and confer on Mason's continuing wage loss, calculated from May 13, 2010, less actual earnings accrued,[16] through the date on which she accepts or refuses the offer of reinstatement, or achieves and maintains equivalent earnings. (*Dept. Fair Empl. & Hous. v. The Standard Register Company* (Mar. 29, 1999) No. 99-04, FEHC Precedential Decs. 1999, CEB 2, p. 23 [1999 WL 335138 (Cal.F.E.H.C.)]; *Dept. Fair Empl. & Hous. v. Centennial Bank* (Jan. 30, 1987) No. 87-03, FEHC Precedential Decs. 1986-87 CEB 6, p. 19 [1987 WL 114851 (Cal.F.E.H.C.)].)

C. Actual Damages: Compensatory Damages for Emotional Distress

The DFEH seeks an award of $50,000 in emotional distress damages to Mason. (Gov. Code § 12970, subd. (a)(3).) The Commission has the authority to award actual damages for emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses in an amount not to exceed, in combination with any administrative fines imposed, $150,000 per aggrieved person per respondent. (Gov. Code, § 12970, subd. (a)(3).)

In determining whether to award damages for emotional injuries, and the amount of any award for these damages, the Commission considers relevant evidence of the effects of discrimination on the aggrieved person with respect to: physical and mental well-being; personal integrity, dignity, and privacy; ability to work, earn a living, and advance in his or her career; personal and professional reputation; family relationships; and, access to the job and ability to associate with peers and coworkers. The duration of the injury and the egregiousness of the discriminatory practice are also factors to be considered. (Gov. Code, § 12970, subd. (b); *Dept. Fair Empl. & Hous. v. Aluminum Precision Products, Inc.* (Mar. 10, 1988) No. 88-05, FEHC Precedential Decs. 1988-89, CEB 4, pp. 8-10 [1988 WL 242635 (Cal.F.E.H.C.)].)

Mason credibly testified that after she was terminated from her job at UPS, she experienced sadness, disappointment, depression and anger. Initially, Mason felt disbelief. She knew that she had been working during the 12-month period UPS said she had been

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[16] The money Mason was paid by the U.S. Census in May and June 2010 should be offset as part of her post-hearing earnings.

absent, so thought that there must have been a mistake, as there was no logical reason that she would be fired.

Mason had worked diligently for UPS for 10 years, and had felt that she was part of the UPS "family." Mason testified that as a result of losing her job, her self esteem was damaged, and she had sustained "a blow to [her] ego." She felt insecure to have to depend on her husband to be the sole provider, having been employed and self reliant since she was 14 years old. Mason testified that she had always been proud of her independence.

The record showed that, after Mason lost her job at UPS, she became less motivated in her daily tasks, neglecting to balance her checkbook and take care of her home. She had trouble sleeping. She stopped enjoying activities with her family, and was short-tempered with her children. The ongoing financial pressure that the family had been experiencing became even more worrying after Mason lost her job.

Mason's husband Derek testified that Mason became withdrawn and unhappy as a result of the loss of her job. He testified that, from his observations, the loss of her job made her depressed and emotionally "devastated."

Notwithstanding the significant effect that the termination of her employment had on Mason's sense of dignity and self-worth, and her familial relationships, Mason exhibited a tendency at hearing to downplay her emotional distress. For example, she agreed with respondent's counsel that she said in her deposition that she was "fine," and agreed that she did not seek medical assistance for the stress that she was feeling. She testified at hearing that she did not "like talking about [her] issues."

UPS argues that Mason's distress was related to factors other than the termination of her employment: the diminution of physical activities, such as quad-riding and ski-ing, was attributable to her knee injury; and the strain on the Mason family finances had existed prior to Mason's loss of her job. Further, UPS points out that the stress of litigation is not compensable as part of actual damages for emotional distress.[17]

Considering the facts of this case in light of the factors set forth in Government Code section 12970, subdivision (c), UPS will be ordered to pay Mason $25,000 in damages for

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[17] Respondent also asserts that the Workers' Compensation Act is "the sole and exclusive remedy of the employee" for all injuries "arising out of the course of employment." The Supreme Court held to the contrary in *City of Moorpark v. Sup. Ct., supra,* 18 Cal.4th at p. 1158. Respondent's argument, however, suggests that all of Mason's emotional distress resulted from her underlying knee injury and thus had already been compensated for in the workers' compensation proceedings. This is not borne out by the evidentiary record credibly establishing Mason's distress at being fired by UPS, and the effects on her family and her sense of self worth. Moreover, the award for emotional distress damages in this case expressly does not include any award for complainant's upset at her underlying knee injury, the stress of litigation, the Masons' financial stress predating Mason's termination of employment, nor for any curb of family activities due to her knee surgery. Rather, as provided in Government Code section 12970, the award addresses the effects of respondent's unlawful employment practices under the FEHA.

her emotional distress. Interest will accrue on this amount, at the rate of ten percent per year, compounded annually, from the effective date of this decision until the date of payment.

D. Administrative Fine

The DFEH seeks an order awarding an administrative fine, arguing that the record establishes that UPS consciously disregarded Mason's rights to a discrimination-free workplace, by willfully insisting on compliance with UPS's own procedures, and by ignoring "critical medical information." The DFEH argues that an administrative fine in the sum of $25,000 should be ordered.

UPS argues that an administrative fine is not warranted because there was no evidence of bad faith by UPS, which discharged its legal obligation to attempt to engage Mason in the interactive process and retain her in employment. UPS further argues that Mason's obstruction of that process should not result in penalties against UPS.

The Commission has the authority to order administrative fines pursuant to the Act where it finds, by clear and convincing evidence, a respondent "has been guilty of oppression, fraud, or malice, expressed or implied, as required by section 3294 of the Civil Code." (Gov. Code, § 12970, subd. (d).) In determining the appropriate amount of an administrative fine, the Commission shall consider relevant evidence of, including but not limited to, the following: willful, intentional, or purposeful conduct; refusal to prevent or eliminate discrimination; conscious disregard for the rights of the complainant; commission of unlawful conduct; intimidation or harassment; conduct without just cause or excuse, or multiple violations of the Act. (Gov. Code, § 12970, subd. (d).) Any administrative fine is payable not to complainant but to the state's General Fund, and may not exceed, in combination with any award of compensatory damages for emotional distress, $150,000 per complainant, per respondent. (Gov. Code, § 12970, subds. (a)(3); (b)(6)(c); and (b)(6)(d).)

In this case, the DFEH established by clear and convincing evidence that UPS discriminatorily terminated Mason's employment because it regarded her as disabled based on her medical restrictions. UPS ignored Mason's 10-year track record as a dedicated employee, willfully mischaracterizing her status as "residual disability," and thereby penalized her for having restrictions, without evaluating whether she was actually doing her job. The evidence showed that a simple check with her supervisor, or with Mason herself, would have revealed that she was doing her job. The record also showed, clearly and convincingly, that UPS's application of its policies to Mason, in particular, its 12-month administrative termination rule, was heavy-handed, lacking in flexibility, and lacking the requisite individualized assessment of the needs of employees with disabilities that is mandated by the FEHA. By this conduct, the DFEH established that UPS acted with a willful and conscious disregard of Mason's rights as an individual with a disability.

Accordingly, an administrative fine in the sum of $10,000 will be ordered payable by UPS to the state's General Fund. (Civ. Code, § 3294; Gov. Code, § 12970, subd. (d).)

Interest will accrue on this amount, at the rate of ten percent per year, compounded annually, from the effective date of this decision until the date of payment.

E. Affirmative Relief

The DFEH asks that respondent be ordered to: cease and desist from discriminating against persons with disabilities; provide training to all management personnel and employees on the FEHA's requirements; and post orders, as forms of affirmative relief, under the Act.

The Act authorizes the Commission to order affirmative relief, including an order to cease and desist from any unlawful practice, and an order to take whatever other actions are necessary, in the Commission's judgment, to effectuate the purposes of the Act. (Gov. Code, § 12970, subd. (a)(5).)

This decision finds that it is appropriate to order UPS to cease and desist from discriminating against employees with disabilities. UPS will also be ordered to post a notice acknowledging its unlawful conduct toward Mason (Attachment A) along with a notice of employees' rights and obligations regarding unlawful discrimination under the Act (Attachment B). In addition, UPS will be ordered to develop, implement, and disseminate a policy that advises management and supervisors of their FEHA obligations toward employees with disabilities. Finally, UPS will be ordered to provide training on that policy to supervisors and managers within its California Southeastern region.

ORDER

1. Respondent United Parcel Service, Inc. shall immediately cease and desist from discriminating against employees with disabilities under the Fair Employment and Housing Act.

2. Within 60 days of the effective date of this decision, United Parcel Service, Inc. shall pay to complainant Eva Linda Mason the amount of $31,170.12, representing the earnings she would have accrued following her release to return to work in November 2008. Interest shall accrue on this amount at the rate of ten percent per year, compounded annually, from the date the earnings accrued until the date of payment.

3. Within 20 days of the effective date of this decision, respondent United Parcel Service, Inc. shall offer Eva Linda Mason reinstatement into her former position as an Operations Management Specialist, or a substantially comparable position. Mason shall have 10 days from the date of respondent's offer of reinstatement to accept or reject reinstatement. Upon Mason's acceptance, she shall be reinstated immediately, with all seniority, status and other terms of employment that would have accrued to her had she remained in respondent's employment.

4. Within 60 days of the effective date of this decision, respondent United Parcel Service, Inc. and the Department of Fair Employment and Housing shall attempt to reach agreement on the amount owed complainant Eva Linda Mason in post-hearing front pay, calculated from May 13, 2010, through the date on which she accepts or refuses the offer of reinstatement made in compliance with section 3 of this Order. The amount shall be reduced by any wages or earnings actually earned by complainant in that period, and shall bear interest, calculated at the rate of ten percent per year, running from the date the earnings accrued, and compounded annually, until the date of payment. The parties shall, within 70 days of the effective date of this decision, report the agreed amount to the Commission for its approval, or report their failure to agree. Respondent United Parcel Service, Inc. shall pay the agreed amount within 10 days after the Commission approves it, and verify said payment to the Commission in writing. If respondent and the Department of Fair Employment and Housing do not reach an agreement, or the Commission does not approve, this element of the damages award shall be returned for further hearing. The Commission shall retain jurisdiction over this case for the purpose of determining, if the parties are unable to agree, the amount of front pay to be ordered.

5. Within 60 days of the effective date of this decision, United Parcel Service, Inc. shall pay to complainant Eva Linda Mason the amount of $25,000 in emotional distress damages. Interest shall accrue on this amount at the rate of ten percent per year, compounded annually, running from the effective date of this decision to the date of payment.

6. Within 60 days of the effective date of this decision, respondent United Parcel Service, Inc. shall pay to the State of California's General Fund an administrative fine in the amount of $10,000, together with interest on this amount, at the rate of ten percent per year, from the effective date of this decision until the date of payment.

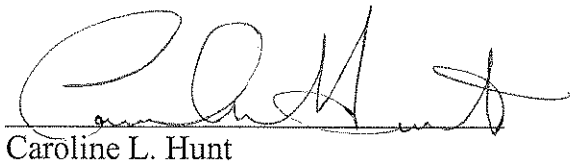
7. Within 60 days of the effective date of this decision, United Parcel Service, Inc. shall develop, implement, and disseminate a policy that complies with respondent's FEHA obligations toward employees with disabilities, either actual or perceived, and shall provide training on that policy to supervisors and managers in United Parcel Service, Inc.'s Southeastern California District.

8. Within 10 days of the effective date of this decision, United Parcel Service, Inc.'s authorized representative shall complete, sign and post clear and legible copies of the notices conforming to Attachments A and B in United Parcel Service, Inc.'s Riverside and Ontario facilities located within the Southeastern California District. These notices shall not be reduced in size, defaced, altered or covered by any material. Attachment A shall be posted for a period of 90 working days. Attachment B shall be posted permanently.

9. Within 100 days after the effective date of this decision, United Parcel Service, Inc. shall in writing notify the Department of Fair Employment and Housing and the Commission of the nature of its compliance with sections two through eight of this order.

Any party adversely affected by this decision may seek judicial review of the decision under Government Code section 11523, Code of Civil Procedure section 1094.5 and California Code of Regulations, title 2, section 7437. Any petition for judicial review and related papers should be served on the DFEH, Commission, respondent, and complainant.

DATED: March 29, 2011



Caroline L. Hunt
Administrative Law Judge

ATTACHMENT A

NOTICE TO ALL UNITED PARCEL SERVICE, INC.'S EMPLOYEES AND APPLICANTS

Posted by Order of the FAIR EMPLOYMENT AND HOUSING COMMISSION
An Agency of the State of California

After a full hearing, the California Fair Employment and Housing Commission has found that United Parcel Service, Inc. is liable for discriminatorily terminating the employment of an employee based on disability. (Gov. Code, § 12940, subd. (a).) (Dept. Fair Empl. & Hous. v. United Parcel Service, Inc. (2011) No. 11-___.)

As a result of the violation, United Parcel Service, Inc. has been ordered to post this notice and to take the following actions:

1. Cease and desist from violating employees' rights to discrimination-free employment based on disability as protected under the provisions of the Fair Employment and Housing Act.

2. Pay the employee back pay and compensatory damages for emotional distress.

3. Reinstate the employee and pay front pay.

4. Develop, implement, and disseminate a policy reflecting the FEHA's protections for employees' disabilities.

5. Provide training on that policy to its current managers and supervisors currently working at United Parcel Service, Inc.'s California Southeastern division.

6. Post a statement of employees' rights and remedies regarding discrimination based on disability and conduct training about these rights.

Dated: _____ By: _____
Authorized Representative for
United Parcel Service, Inc.

THIS NOTICE IS REQUIRED TO BE POSTED UNDER PENALTY OF LAW BY THE CALIFORNIA FAIR EMPLOYMENT AND HOUSING COMMISSION. IT SHALL REMAIN POSTED FOR NINETY (90) CONSECUTIVE WORKING DAYS FROM THE DATE OF POSTING AND SHALL NOT BE ALTERED, REDUCED, OBSCURED, OR OTHERWISE TAMPERED WITH IN ANY WAY THAT HINDERS ITS VISIBILITY.

ATTACHMENT B

DISABILITY DISCRIMINATION

Employees and applicants are entitled to be free from discrimination on the basis of an actual or perceived disability and entitled to reasonable accommodation for that disability as allowed by law. A physical disability includes having any physiological disease, disorder, condition, cosmetic disfigurement, or anatomical loss that affects one or more of the body's major systems and limits a major life activity. A mental disability includes having any mental or psychological disorder or condition that limits a major life activity. If, because of your actual or perceived disability, an employer:

- refuses to hire or promote you,
- fails to provide you reasonable accommodation that is not an undue hardship to your employer,
- fails to engage in a timely, good faith interactive process to determine reasonable accommodation,
- retaliates against you,
- terminates your employment, or
- otherwise discriminates against you in your terms and conditions of employment, that employer may have violated the Fair Employment and Housing Act.

If you feel that any of these illegal practices have happened to you, or that you have been retaliated against because you opposed these practices, you have one year to file a complaint with the state Department of Fair Employment and Housing, at (800) 884-1684.

The DFEH will investigate your complaint. If the complaint has merit, the DFEH will attempt to resolve it. If no resolution is possible, the DFEH may prosecute the case with its own attorney before the Fair Employment and Housing Commission. The Commission may order the unlawful activity to stop, and require your employer to reinstate you, to pay back wages and other out-of-pocket losses, damages for emotional injury, an administrative fine, and to give other appropriate relief. Alternately, you may retain your own attorney to take your case to court.

Dated: _____ By: _____

Authorized Representative for
United Parcel Service, Inc.

THIS NOTICE IS REQUIRED TO BE POSTED UNDER PENALTY OF LAW BY THE CALIFORNIA FAIR EMPLOYMENT AND HOUSING COMMISSION. IT SHALL BE POSTED INDEFINITELY, AND SHALL NOT BE ALTERED, REDUCED, OBSCURED, OR OTHERWISE TAMPERED WITH IN ANY WAY THAT HINDERS ITS VISIBILITY.

DECLARATION OF SERVICE BY CERTIFIED MAIL

I, **Cynthia L. Jones,** declare:

I am a citizen of the United States, over eighteen (18) years of age, and not a party to the within cause; my business address is 455 Golden Gate Avenue, Suite 10600, San Francisco, California, 94102.

On **May 3, 2011**, I served a copy of the **NOTICE OF COMMISSION FINAL DECISION AND DECISION, 11-05 (DFEH v. United Parcel Service, Inc. (MASON))** on each of the following, by placing the same in envelopes addressed respectively as follows:

Sybil Villanueva, Assoc. Chief Counsel
Department of Fair Employment and Housing
1055 West 7th Street, Suite 1400
Los Angeles, CA 90017

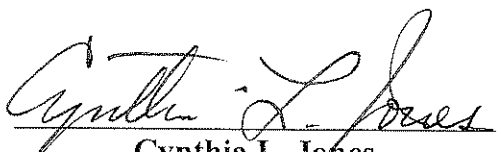
Cindy Morgan, Esq.
Paul, Hastings, Janofsky &Walker, LLP
515 South Flower Street, 25th Floor
Los Angeles, CA 90071

Eva Linda Mason
2144 Farm Meadows Drive
San Jacinto, CA 92582

Each said envelope was then, on said date, sealed and deposited in the United States mail at San Francisco, California, the County in which I am employed, with the postage thereon fully prepaid by me.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on **May 3, 2011** at San Francisco, California.



Cynthia L. Jones